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# Completing the Portrait: Concluding Thoughts About Charles Reich

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## COMPLETING THE PORTRAIT: CONCLUDING THOUGHTS ABOUT CHARLES REICH

*Rodger D. Citron\**

### I. INTRODUCTION<sup>1</sup>

Judge Calabresi–Guido–discussed the way in which Charles’s scholarship was an expression of himself. I completely agree.

I will discuss how Charles increasingly revealed himself in his trilogy of works from *The New Property*<sup>2</sup> to *The Greening of America*<sup>3</sup> to *The Sorcerer of Bolinas Reef*.<sup>4</sup>

As we have discussed at great length, *The New Property* was a brilliant law review article that continues to inform how law is taught and practiced today. It is a masterpiece. Nonetheless, it is a conventional law review article, offering analytical insights in support of a bold and creative thesis, supported by numerous footnotes.

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<sup>1</sup> This article is based upon my presentation at the conference. I have revised my remarks and added citations. Thank you to the Hon. Guido Calabresi and Deputy Dean Douglas Kysar for allowing me to include their remarks in this article.

<sup>2</sup> Charles Reich, *The New Property*, 73 YALE L. J. 733 (1964).

<sup>3</sup> CHARLES REICH, *THE GREENING OF AMERICA* (1970) [hereinafter *THE GREENING*].

<sup>4</sup> CHARLES REICH, *THE SORCERER OF BOLINAS REEF* (1976) [hereinafter *THE SORCERER*].

*The Greening of America* was an unexpected best-seller that combined sociological analysis with a celebration of the youth culture sweeping over and significantly reshaping American society in the late 1960s. Although there were no footnotes, and the book was widely read and debated, *The Greening* essentially was an academic work that drew on a number of different disciplines.<sup>5</sup>

*The Sorcerer of Bolinas* was an autobiographical book. It often is described as a memoir,<sup>6</sup> but I do not think that is quite right. When Charles and I discussed the book, he noted that there are composite figures and other aspects of the text that make it somewhat different from or not exactly a memoir.

Two themes run through these three very different texts. One, which we have discussed at length, is Charles's concern for the integrity of the individual in modern society. The second—which has been implicit in our discussion, if not fully considered—is his concern for authenticity.

I will discuss how Charles revealed himself through the arc of this trilogy. In doing so, I will try to avoid repeating what we've discussed so far. Before tracing this journey, I first want to set the stage by acknowledging some of the formative influences on Charles's life and work.

## II. FORMATIVE INFLUENCES

Let me start with someone from Charles's life before he became a law student: Tom Emerson, who was a professor at Yale Law School. He was a family friend who encouraged Charles to apply to Yale Law. I have asked Guido to say more about Professor Emerson, so we'll come back to him later.<sup>7</sup>

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<sup>5</sup> In the Acknowledgments listing the books that influenced *The Greening*, Reich begins with Karl Marx's *The Economic and Philosophic Manuscripts of 1844*, includes several books by Herbert Marcuse, R.W.B. Lewis's *The American Adam*, Norman Mailer's *Why Are We in Vietnam?*, and concludes with a note on Ken Kesey's *Sometimes a Great Notion*. THE GREENING, *supra* note 3, at 431-32.

<sup>6</sup> See, e.g., Matt Schudel, *Charles Reich, Author of 1970 Bestseller 'The Greening of America,' Dies at 91*, WASHINGTON POST (Jun. 18, 2019, 9:24 AM), [https://www.washingtonpost.com/local/obituaries/charles-reich-author-of-1970-best-seller-the-greening-of-america-dies-at-91/2019/06/18/87c13664-91d6-11e9-aadb-74e6b2b46f6a\\_story.html](https://www.washingtonpost.com/local/obituaries/charles-reich-author-of-1970-best-seller-the-greening-of-america-dies-at-91/2019/06/18/87c13664-91d6-11e9-aadb-74e6b2b46f6a_story.html).

<sup>7</sup> See *infra* Section VI. Judge Calabresi also will discuss the influence of another Yale Law School professor, Fred Rodell, on Charles.

As you already may know, Charles attended Oberlin College, graduating in 1949. During his senior year, Charles was not sure what to do after graduation. He did not envision a career as a lawyer but nevertheless interviewed with another Oberlin graduate, then-Professor Erwin Griswold of Harvard Law School, who later became Dean of Harvard Law School. As Charles told the story, Griswold asked Charles about his interests. After listening to the answer, Griswold said that he did not belong in the law and suggested instead that he should pursue a career in sociology.

Nonetheless, after conferring with Tom Emerson, Charles applied only to Yale Law School, was admitted, and matriculated. Charles found Emerson's discussion of Yale's interest in public policy and legal realism compelling.

Another person who must be acknowledged for his influence on Charles is Justice William O. Douglas. Charles met Douglas while he was clerking on the Supreme Court and developed a friendship with him afterwards, while he was working at a law firm in Washington, D.C. They hiked together and maintained a friendship even after Douglas retired from the Court in 1975.<sup>8</sup> Charles tells the story of his friendship with Justice Douglas in the article published elsewhere in this volume.<sup>9</sup> I just want to say thank you to Charles's family and his good friend Greg Marriner for allowing us to publish the article and the accompanying photographs.

Charles's friendship with Justice Douglas prompts a question that I've asked Professor Kysar to address: In what ways, if any, did *The Greening of America* influence the development of the environmental law movement? We'll come back to that question later.<sup>10</sup>

### III. FROM THE NEW PROPERTY TO THE GREENING OF AMERICA

#### A. A Glimpse of Charles in his Law Review Articles after

<sup>8</sup> The friendship is evident in the correspondence between Reich and Justice Douglas over the course of more than two decades. See Rodger D. Citron, *Was Bill Douglas as Bad as Bruce Murphy's New Biography Makes Him Out to Be?*, HIST. NEWS NETWORK, <https://historynewsnetwork.org/article/1428> (last visited Sept. 13, 2020).

<sup>9</sup> See Charles A. Reich, *Keeping Up: Walking With Justice Douglas*, 36 TOURO L. REV. 727 (2020).

<sup>10</sup> Professor Kysar provides his thoughts on Charles Reich and the development of the environmental law movement at *infra* Section VII.

### The New Property

There are a number of interesting developments from the publication of *The New Property* in 1964 to *The Greening* in 1970. The most important is that Charles shifted his focus from the law to the humanities. As he did that, he began to reveal more of himself—not much, to be sure, but still more than the typical law professor in the usual law review article.

For example, *Police Questioning of Law Abiding Citizens*,<sup>11</sup> published in 1966, comes out of and describes, in the first person, Charles's encounters with police officers while walking late at night or early in the morning.<sup>12</sup>

Charles reveals a bit of himself in another law review article published in 1966, *The Law of the Planned Society*.<sup>13</sup> I want to discuss this article in some detail because, among other things, Charles believed it should have received more attention. Charles viewed this article as an analog to *The New Property*—in his view, what *The New Property* was to entitlements, such as welfare benefits, *The Law of Planned Society* was to land use and planning. “If only I had given the article a better title,” he once told me.

*The Law of the Planned Society* is a marvelous article. It begins with Charles describing unrest in the streets with citizens confronting government officials and being threatened with arrest.<sup>14</sup> What caused the confrontations?

It was not the Vietnam War, though by 1966, when the article was published, protests against the war had substantially increased.<sup>15</sup> It was not police misconduct, although riots in Watts had occurred a year earlier. But that's not what Charles is describing.

So, what was going on? As Charles wrote, the controversies “involve the supposedly non-political, scientific areas of planning.”<sup>16</sup>

<sup>11</sup> Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L.J. 1161 (1966).

<sup>12</sup> *Id.* at 1161.

<sup>13</sup> Charles A. Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

<sup>14</sup> *Id.* at 1227–29.

<sup>15</sup> See, e.g., *Protests and Backlash*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-student-antiwar-protests-and-backlash/>. For a more detailed account of protests against the Vietnam War, see, e.g., TOM WELLS, *THE WAR WITHIN: AMERICA'S BATTLE AGAINST THE VIETNAM WAR* (1994).

<sup>16</sup> Reich, *supra* note 13, at 1228.

He elaborated: “The planning process, theoretically the realm of the detached expert, has been made political by the direct action of citizens.”<sup>17</sup>

The *Law of the Planned Society* both documents and contributes to the shift in administrative law from the era of deference to administrative agencies to the era of skepticism that emerged during the 1960s. As part of this shift, neither courts nor others, including the public, were as reflexively deferential to the claimed expertise of administrative officials as they were during the New Deal and the ensuing decades. In addition, courts became more receptive to greater public participation in agency proceedings during this period of time.

One final note about *The Law of the Planned Society*: It concludes with Charles revealing himself, just a bit, in the conclusion. Here’s the last paragraph:

The issue is all summed up in the supersonic plane. It can travel faster from somewhere to somewhere, but its huge cost will take money from other domestic needs and its sonic boom menaces those who live in its path. The President – acting in secret and without submitting the question to Congress or the people – has ordered the plane to be built, partly, we are told, in order to increase United States prestige. Is the decision to authorize the plane a wise one? Has our system of planning been able to make an adequate choice among alternatives? Is the method of decision consistent with our democratic ideals? Do we know whether most people would really prefer faster transportation if they experienced the invasion of their lives that comes with it? One night last summer I slept out on the porch of a cottage by a lake. I woke early in the morning and lay watching the fragile silence of pines, mist and water. Suddenly, from a casually passing plane, came a shattering sonic boom. In that inhuman impact, all the hitherto academic shortcomings of administrative law came home to me.<sup>18</sup>

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<sup>17</sup> *Id.* at 1229.

<sup>18</sup> *Id.* at 1269–70.

## B. The Turn From Law to the Humanities

As I noted earlier, Charles gradually moved away from the law and towards the humanities as the 1960s progressed, culminating in the publication of *The Greening of America*, as an article in *The New Yorker* in 1970, and then as a book. I want to continue exploring the transition Charles made during this time by commenting on three different texts.

The first is a law review article, *Toward the Humanistic Study of Law*, published in 1965.<sup>19</sup> Noting the idealism and intellectual curiosity of students entering law school in the mid-1960s, Charles called for a broader, more interdisciplinary curriculum. Law schools “lack – and desperately need – a profession concerned with the overall structuring of society,” he wrote.<sup>20</sup> Charles argued that, “the study of law as a subject matter must be a study of society in the moral sense of ought and should. Herein lies law’s true kinship with literature and with the other arts which seek a critique and an overview of society.”<sup>21</sup>

The second is another scholarly article that we’ve discussed a bit over the course of the conference. It is Charles’s article on Billy Budd, published in *The Yale Review*—not the *Yale Law Journal*—in 1967.<sup>22</sup> It was a seminal article in the development of the law and literature movement championed by James Boyd White and others.<sup>23</sup>

When re-reading the article, I was struck by Charles’s description of Captain Vere. He wrote, “The chief agent of the law is Captain Vere.”<sup>24</sup> Billy Budd explores the drama taking place in Vere’s consciousness.<sup>25</sup> Charles elaborated that the drama is the growth of Vere’s humanity from “pedantic Vere” to someone who “recognizes that there are values beyond those which the law embodies.”<sup>26</sup>

<sup>19</sup> Charles A. Reich, *Toward the Humanistic Study of Law*, 74 YALE L.J. 1402 (1965).

<sup>20</sup> *Id.* at 1408.

<sup>21</sup> *Id.*

<sup>22</sup> Charles A. Reich, *The Tragedy of Justice in Billy Budd*, 56 YALE REV. 374 (1967).

<sup>23</sup> See JAMES BOYD WHITE, *THE LEGAL IMAGINATION* (1973); see also RICHARD POSNER, *LAW AND LITERATURE* (1<sup>st</sup> ed. 1988).

<sup>24</sup> Reich, *supra* note 22, at 377.

<sup>25</sup> *Id.* at 381.

<sup>26</sup> *Id.*



I believe that, for Charles at this time, this description of Vere was, in part, autobiographical given his interest in getting beyond the law as an academic.<sup>27</sup> Even though Charles was continuing to wrestle with the law, albeit in a literary text, it's clear that by 1967 he was leaving conventional legal scholarship in the law reviews behind.

The third text is a letter that Charles wrote to his Yale Law School colleague, Alexander Bickel, in the summer of 1967, when Charles was in Berkeley, California. Charles wrote, "Out here the atmosphere among the students is profoundly anti-intellectual. In place of thinking, they substitute ideology, and they are harshly impatient with doubters and questioners." Nevertheless, he recognized that "[t]here is much idealism" in the youth movement and insisted that "one can't help admire some of their values." The letter ended with a glimpse of Reich beginning to find his groove: "On Sundays the park is full of great sights and sounds (the latter made by electric bands with such names as, The Second Coming, Big Brother and the Holding Company, and The Grateful Dead)."<sup>28</sup>

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<sup>27</sup> It also is possible to see Vere as a representative of Consciousness II thinking that Charles described three years later in *The Greening of America*. Vere is intelligent and sensitive yet constrained by his duty under the law. As Reich notes, "As Melville presents the case, there is no escape for Vere." Reich, *supra* note 21, at 379. Furthermore, because Vere "is a man in and of society, because he occupies a position of duty and responsibility, he chooses the law, however inadequate it may be." *Id.* at 389. In the same way, I think, Consciousness II, with its commitment to and embrace of the "Corporate State," is characterized by a sense of duty to society that suppresses individuality. See, e.g., REICH, *THE GREENING*, *supra* note 3, at 71 ("One of the central aspects of Consciousness II is an acceptance of the priority of institutions, organizations, and society, and a belief that the individual must tie his destiny to something of this sort, larger than himself, and subordinate his will to it.").

<sup>28</sup> Rodger Citron, *Charles Reich's Journey from the Yale Law Journal to the New York Times' Best-Seller List: The Personal History of The Greening of America*, 52 NEW YORK L. SCH. L. REV. 387, 402 & n.75 (2008). For a comprehensive account of Yale Law School in the 1960s, see LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLTS AND REVERBERATIONS* (2005) [hereinafter *YALE LAW SCHOOL AND THE SIXTIES*]. While I have very few regrets about the conference, one is that Professor Kalman was unable to join us. She has provided thoughtful and thorough accounts of the worlds in which Charles lived, starting with her book on legal realism, her biography of Abe Fortas, and her book on Yale Law School in the 1960s. See LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986); LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* (1992); and KALMAN, *YALE LAW SCHOOL AND THE SIXTIES*.



I am confident that this was the first—and likely the last—letter Professor Bickel received about The Grateful Dead and bands of their ilk. Setting aside the humor of that incongruity, I am reminded of Guido's description of Charles as being out of phase. There is Charles, nearly 40 years old, listening to the music of the "Summer of Love," open to the possibility of new experiences.<sup>29</sup>

As we well know, Charles came back to Yale, continued to explore the counterculture, taught an undergraduate course entitled "The Individual in America," and eventually published *The Greening of America* in 1970.

#### IV. THE PERSONAL SIDE OF THE GREENING OF AMERICA

*The Greening* was debated extensively on the opinion pages of *The New York Times* and, within a year, *The Con III Controversy*, a book of collected commentary, was published.<sup>30</sup> It is beyond the scope of today's conference and my allotted time to discuss *The Greening* in great detail.<sup>31</sup> Still, here are three brief notes about this unlikely best-seller.

First, when talking about his parents, Charles noted that his father was a hematologist who was an excellent diagnostician. Charles believed that he inherited this skill and applied it in a different context in his scholarly efforts to describe and explain American law and society. We see this skill fully realized in *The Greening*.

Second, I would be remiss if I did not at least say something about why *The Greening* struck such a chord when it was published. In substantial part, I think, it was because Charles explained the students to their parents—and assured them that all would turn out well.<sup>32</sup> By being out of phase, Charles not only took the time to relate to the students, he also was able to describe the counterculture and articulate its values to a broad audience.

<sup>29</sup> See Sheila Weller, *Suddenly That Summer*, VANITY FAIR (Jun. 14, 2012), <https://www.vanityfair.com/culture/2012/07/lsd-drugs-summer-of-love-sixties>.

<sup>30</sup> THE CON III CONTROVERSY: THE CRITICS LOOK AT THE GREENING OF AMERICA (Phillip Nobile ed., 1971).

<sup>31</sup> I discuss *The Greening* and the critics' responses to it in *Charles Reich's Journey From the Yale Law Journal to the New York Times Best-Seller List: The Personal History of The Greening of America*, 52 NEW YORK L. SCH. L. REV. 378, 401–12 (2007).

<sup>32</sup> *Id.* at 406–07.

Third, returning to the theme of Charles revealing himself in his work, in my view, a number of Charles's sociological observations in *The Greening* were inspired by his own life.<sup>33</sup> This becomes clear when we examine the third book in the trilogy, *The Sorcerer of Bolinas Reef*.<sup>34</sup>

#### V. CHARLES REICH'S SONG OF HIMSELF IN THE SORCERER OF BOLINAS REEF

I read *The Sorcerer* in the fall of my last year in law school, in 1991. I was inspired to read it because Charles was back at Yale Law, thanks to Guido bringing him back as a visiting professor.

I read the book because I wanted to know more about the older gentleman who was working in the law school library well into the night. Dressed in his khaki pants and button-down shirt, wearing his signature Chuck Taylor canvas sneakers—this attire is memorialized in his Yale Law School portrait—Charles was an intriguing figure. (Charles told me he believed it was important for students to see their professor working in the library.)

*The Sorcerer* is Charles's most autobiographical book. His friend Greg Marriner, who helped Charles with the book, explained to me that it's helpful to note Charles's love of music in order to fully appreciate *The Sorcerer*. Every chapter is written in a different key or strikes a different note.

For example, the first chapter is about Charles's childhood. It's very optimistic and a bit nostalgic. (In his presentation, John Q. Barrett noted that Charles could be nostalgic about President Roosevelt and the New Deal.) I am confident Charles knew and intended that tone in a chapter about youth.

The second chapter is Charles's marvelous account of life in Washington in the 1950s in which, among other things, Charles describes working at his law firm for "Mr. Henderson." We know from Professor Kalman's biography that the imperious, brilliant Mr. Henderson is modeled on Abe Fortas.

Charles had described the status-driven conformity and limits of consumerism of Consciousness II in *The Greening*. Now, in *The*

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<sup>33</sup> *Id.* at 408–09.

<sup>34</sup> REICH, *supra* note 4.

*Sorcerer*, we see that he experienced first-hand the disenchantment of the demands and expectations of Consciousness II.

Why did Charles share his personal stories with the world in *The Sorcerer*? In my view, it reflected the importance of authenticity to him. Charles believed it was necessary for him to be candid about the challenges he had faced and how they led him from Yale Law School to San Francisco in the 1970s.

Two final points. The first comes from Charles himself. He explained to me that *The Greening* and *The Sorcerer* are companion volumes or bookends. *The Greening* was optimistic, while *The Sorcerer* was pessimistic. They can be seen, to borrow from Greg Mariner's insight, as the same or similar texts written in different keys.

The second is to remind everyone that while Charles often describes himself as lonely or isolated in *The Sorcerer*, that certainly was not the way he lived his life. Karen Tani noted this as well in her account of the community of activists and intellectuals who helped Charles write about the plight of welfare recipients in *Midnight Welfare Searches And the Social Security Act*<sup>35</sup> and *The New Property*.<sup>36</sup>

Charles shared with me fond stories about practicing law at Arnold, Fortas & Porter. He loved Yale Law School, even after he left the full-time faculty in 1974 and his stint as a visiting professor from 1991 through 1995. Just as important, he was liked, appreciated, and even loved by attorneys at the law firm and professors at the law school.

In concluding, I return to *The Sorcerer*. In the last chapter, Charles takes us across the Golden Gate Bridge from San Francisco and summons us to Bolinas. In doing so, he very intentionally evokes Walt Whitman's "Song of Myself."<sup>37</sup> I say this sincerely and with love: Charles contained multitudes. We loved him, and we loved all those facets of him. Thank you.

Now we will hear from Judge Calabresi, on Professors Tom Emerson and Fred Rodell, and Professor Kysar, on *The Greening of America* and the environmental law movement.

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<sup>35</sup> 72 YALE L.J. 1347 (1963).

<sup>36</sup> Reich, *supra* note 2.

<sup>37</sup> WALT WHITMAN, SONG OF MYSELF (1892).

**VI. THE HON. GUIDO CALABRESI ON PROFESSOR TOM EMERSON AND PROFESSOR FRED RODELL**

The Hon. Guido Calabresi: Rodger asked me to say something about Tom Emerson and Fred Rodell. When Charlie came to the law school and I did, the law school was described by Leon Lipson as being made up of old Turks and young fogies.

The young fogies were people like Alexander Bickel, Harry Wellington, Joe Goldstein and Abe Goldstein—all the people who had recently come on and who were extraordinary. They lived much more normal lives.

And the old Turks were people who lived rather wild lives and who had very wild ideas. In very different ways, Tom Emerson and Fred Rodell epitomized this group.

**A. Professor Thomas Emerson**

Tom was known as Tommy the Commie, and Fred was known as Fred the Red. But actually, while Fred seemed wilder, he wasn't politically that far out. Tom, instead, was like the anarchist in *Man and Superman*<sup>38</sup> who makes extraordinarily long and boring speeches and carries bombs. Tom carried bombs—intellectual bombs—which were the things that really moved Charles intellectually because Tom was a genuine radical in everything he did, except in the running of faculty.

In faculty things, he was extraordinarily conservative in grading and things like that, which caused a great crisis for him at the end of the 1960s when the students were asking for changes in revolutionary ways and people like Bickel and Wellington, who were rather sympathetic to the changes, were against them because they were being asked for in revolutionary way. And Tom instead, who was against the changes, couldn't oppose them because the students were asking for them in revolutionary ways.

The influence that Tom had on any number of people because of his deep-set radicalism is enormous. He was an important intellectual influence on Charlie. (Tom, incidentally, was Justice Clarence

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<sup>38</sup> GEORGE BERNARD SHAW, *MAN AND SUPERMAN* (1903).

Thomas's favorite teacher. When Clarence Thomas was a student at the law school, he was a radical walking around in dungarees.)

Tom had one thing in mind that he wanted to accomplish other than his general left-wing political views and that was to legalize abortion. And he set out to create a right to privacy in *Griswold*<sup>39</sup> with that specific aim in mind.

I know that because I talked to him and told him if you argue *Griswold* on privacy grounds, you may well lose—Hugo Black will not go along—and you will lose Potter Stewart. So, you will only win if you are able to convince John Harlan.

And he said, “No, no, no, no. That won’t happen. And anyway, that’s the way I want to argue it.” I gave him another way of winning *Griswold* which I thought would have Black with him.

Emerson rejected that because he knew what he wanted to do. The interesting thing is that Tom’s view of privacy was primarily focused on abortion, but the fact of his view on privacy influenced Charles’s view on privacy in a much broader way—and in a way much more interesting than Tom’s result-oriented one. Though Tom got Charles thinking about it, Charles thought way beyond what Tom was doing with respect to privacy.

## B. Professor Fred Rodell

Fred’s influence on Charles was very different. I’m not sure he had much influence on him as a teacher. But Fred was a great friend of Douglas, and it was Douglas who essentially said to Charles, “Pay attention to Fred.” Fred’s influence was of a different sort because Fred had given up the life of the ordinary scholar and had written *Woe Unto You, Lawyers!*<sup>40</sup> and *Goodbye to Law Reviews*<sup>41</sup> and so on. Write for the world in a totally different way and don’t worry what you look like.

And this, in a funny kind of way, influenced Charles to take a chance and write that way.

(Fred instead was constantly causing trouble and so while his position was defended from those from other faculties who urged the school to throw him out, he was not much liked except by some of

<sup>39</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>40</sup> FRED RODELL, *WOE UNTO YOU, LAWYERS!* (1940).

<sup>41</sup> Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

the still-younger people who went back to being more like younger Turks. Tom, instead, was highly regarded in faculty and much loved by people who disagreed with him because he was so much “a faculty member.”).

Fred influenced Charles enough that when Fred died, the fact that little attention was paid to Fred’s death was one of the reasons that Charlie felt that he could not stay here. And then, when the next generation—people like me—became central to the school, he felt maybe Yale was coming back to being “his” Yale.

So, Fred’s influence was a strange one. Fred was a strange one because he made believe he was a lefty when actually he really wasn’t very left.

So that’s a couple of stories. One could go on about each of them forever.

## VII. PROFESSOR DOUGLAS KYSAR ON CHARLES REICH AND THE ENVIRONMENTAL LAW MOVEMENT

Professor Douglas Kysar:<sup>42</sup> Rodger asked me to say a little bit more about Charles Reich’s influence on the environmental law field. I will not purport to speak for the field. I will just say that, from my vantage point, I see him as part of the road not taken by environmental law.

In the late 1960s and early 70s, there was a view among folks like Joseph Sax and a number of others that to really ensure right relations with nature, we need to embed environmental sustainability into the Constitution and make it foundational, make it part of the DNA of the legal system rather than just contingent on political outcomes. You could put Reich, I believe, with this “environmental constitutionalist” group.

This view took a couple of different forms. One version was what we would now call deep ecology. One example is Christopher Stone’s article, *Should Trees Have Standing?*,<sup>43</sup> which was cited in a concurrence by Justice Douglas in an important environmental standing case.<sup>44</sup> The idea is to actually come up with some way to endow nature itself with legal rights.

<sup>42</sup> Joseph M. Field ’55 Professor of Law, Yale University.

<sup>43</sup> Christopher D. Stone, *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

<sup>44</sup> See *Sierra Club v. Morton*, 405 U.S. 727, 742 (1972).

I would not put Reich in this camp necessarily. His environmentalism has always struck me more as a kind of New England, Henry David Thoreau, humanistic brand—one in which we respect nature for the excellence it brings out in ourselves, the caring, and the virtue it brings out in humans.

In any event, Sax spearheaded an attempt to create environmental constitutional rights in which any ordinary citizen, irrespective of legal constraints on standing, could hold the government to account for failing to protect the environment.

Sax got a bill passed in Michigan and several other states. [And] there was an actively debated federal bill that would both give everyone standing to challenge the government for its environmental failures and would give courts substantive authorization to second-guess any statutory level of environmental protection that had been passed. The legislation would have put courts in the position of being super-protectors of the environment.

This mode of scholarship and activism essentially disappears with the rise of the Environmental Protection Agency, the National Environmental Policy Act, the Clean Air Act, and the Clean Water Act. We get into the era of technocratic managerial environmentalism; the role of the citizen is to engage in the administrative rule-making process and to challenge agency actions in court when they fail to live up to statutory commands.

I would predict that Reich would see that development as a loss of direct engagement by ordinary people in the securing of natural sustainability, which ultimately secures liberty. What folks like he and Sax really wanted to preserve was direct citizen engagement with this right to a natural environment that can continue to support human flourishing.

Once we put responsibility in the hands of the technocrats and the bureaucrats and the judges through administrative law, we have lost. And now, 50 years later, I can safely say that they were right. We have lost.

All you have to do is read the Ninth Circuit opinion two weeks ago in the *Juliana* case, in which a climate justice advocacy organization called Our Children's Trust is trying to hold the federal government to account for its multi-decade failure to address greenhouse gases and the climate change problem.<sup>45</sup>

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<sup>45</sup> *Juliana v. U.S.*, 947 F.3d 1159 (9th Cir. 2020).